



INTERIOR BOARD OF INDIAN APPEALS

Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts
v. Portland Area Director, Bureau of Indian Affairs

19 IBIA 31 (10/23/1990)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JOINT BOARD OF CONTROL FOR THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-40-A

Decided October 23, 1990

Appeal from a decision concerning the 1989 Flathead Agency Operating Procedures for Irrigation and Fisheries.

Affirmed in part; remanded in part.

1. Indians: Hunting, Fishing, and Gathering Rights: On Reservation-
Indians: Water and Power Resources: Irrigation Projects--Indians:
Water and Power Resources: Water Rights

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

2. Administrative Procedure: Burden of Proof--Indians: Water and
Power Resources: Irrigation Projects

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

APPEARANCES: Jon Metropoulos, Esq., Helena, Montana, for appellant; Vernon Peterson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Patrick L. Smith, Esq., Tribal Legal Department, Pablo, Montana, for the Confederated Salish and Kootenai Tribes.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Joint Board of Control for the Flathead, Mission and Jocko Irrigation Districts seeks review of a November 22, 1989, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the 1989 "Flathead Agency Operating Procedures for Irrigation and Fisheries" (1989 Operating Procedures) issued by the Superintendent, Flathead Agency, BIA. For the reasons discussed below, the Board affirms the Area Director's decision in part and remands the case to him for further proceedings, as discussed below.

Background

The Flathead Irrigation Project serves members of the Confederated Salish and Kootenai Tribes (Tribes) and other irrigators on the Flathead Reservation. ^{1/} It is operated by the Flathead Agency under regulations at 25 CFR Part 171. Since 1985, when a severe drought diminished water supplies on the reservation, the operating procedures for the project have been subject to a continuing dispute, arising out of the competing demands of tribal fisheries and irrigated agriculture. The Area Director's decision summarized the history of this dispute:

In 1985 the * * * Tribes initiated litigation to enjoin [BIA] from dewatering streams and reservoirs on the reservation. That suit was dismissed after the Tribes and the United States entered into a stipulation which established emergency minimum instream flows and minimum reservoir pool levels for the 1985 irrigation season. The Stipulation also provided that [BIA] would initiate a more comprehensive planning effort for the 1986 irrigation season. See Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, 616 F. Supp. 1292 (D. Mont. 1985). In 1986, pursuant to the commitment made in the 1985 Stipulation, [BIA] prepared a water management plan which included instream flow levels based upon wetted perimeter studies that had been conducted in the spring of 1986 by BIA, U.S. Fish and Wildlife Service, and tribal technical personnel. [Appellant] filed an action to enjoin [BIA] from implementing the 1986 water management plan. The court issued a temporary restraining order enjoining implementation of the plan and on October 16, 1986, granted a preliminary injunction prohibiting the BIA from implementing the 1986 plan or any other plan which failed to consider the rights of the irrigators. Joint Board of Control v. United States, 646 F. Supp. 410 (D. Mont. 1986), reversed, 832 F.2d 1127 (9th Cir. 1987), cert. denied, [486 U.S. 1007] (1988) [(JBC I)]. * * * [T]he district court enjoined implementation of the water management plan on the basis that it had been developed by tribal and [BIA] personnel without consultation with the irrigators. 646 F. Supp. at 423-25. * * * On appeal, the Ninth Circuit Court of Appeals reversed the district court's injunction and held that [BIA] and the Tribes have the responsibility and authority to initially determine the instream flow necessary to protect the

^{1/} The Flathead Reservation was established by Article II of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, "for the exclusive use and benefit of said confederated tribes as an Indian reservation." Article III of the treaty provided: "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians."

Authority for the Flathead Irrigation Project derives from section 14 of the Act of Apr. 23, 1904, 33 Stat. 302, 305, as amended by the Act of May 29, 1908, 35 Stat 444, 450. The 1904 act authorized allotments to tribal members and opening of the reservation to non-Indian settlement.

Tribes' treaty fishing rights, although the irrigators have the right to challenge, in an appropriate forum, whether those flows represent an appropriate quantification of the reserved right. 832 F.2d at 1132. * * * The Ninth Circuit remanded the case to the district court, where it was dismissed without prejudice by order dated July 26, 1989. After the district court's 1986 injunction, and during the pendency of the appeal, [BIA] maintained "status quo flows" based upon emergency calculations made using the Tennant methodology. The 1987 Interim Management Plan developed by the Agency also contained a flow regime based upon those status quo flows. However, in an action filed in June 1987 [appellant] sought to enjoin implementation of the 1987 Operating Procedures. In an opinion dated July 21, 1987, the district court denied [appellant's] Motion for Preliminary Injunction for failure to exhaust administrative remedies. On appeal, the Ninth Circuit Court of Appeals upheld the district court's decision that [appellant] had not exhausted available administrative remedies, noting that the primary purpose of the exhaustion doctrine is to permit the agency to exercise its discretion and expertise and make a record for district court review. Joint Board of Control v. United States, 862 F.2d 195 (9th Cir. 1988) [(JBC II)].

(Area Director's Decision at 3-4).

In mid-February 1989, the Superintendent circulated for public review a draft of operating procedures intended to govern the 1989 irrigation season, April 15 through October 31, 1989. He also published notice of the draft procedures in several local newspapers. In accordance with the notice, a public hearing was held on March 16, 1989, to take testimony concerning the draft. Written comments were also accepted. Only one individual testified at the March 16 hearing. Appellant, the Tribes, and some individuals submitted written comments.

The Superintendent issued the final 1989 Operating Procedures in May 1989. The document released by the Superintendent included responses to comments made by appellant, the Tribes, and others. The transmittal notice stated that further comments and recommendations for revisions would be considered at any time, and modifications made to the procedures if warranted. The notice also stated that any interested party could appeal all or part of the procedures under 25 CFR Part 2. Appellant accordingly appealed to the Area Director, who affirmed the 1989 Operating Procedures in a decision issued on November 22, 1989. That decision concluded:

The 1989 Operating Procedures incorporate changes, refinements and development in the annual interim water management planning process that has been carried on by the Agency since 1986. The most significant change for 1989 involves implementation of interim instream flow requirements based on wetted perimeter studies conducted by tribal, [BIA], and U.S. Fish and Wildlife Service personnel in 1986. The litigation during the intervening years prevented [BIA] from implementing those flows

prior to development of the 1989 plan. The Agency developed the final 1989 Operating Procedures after considering and responding to comments and objections to a draft plan. After reviewing the record of that decision and the objections and arguments presented in your Statement of Reasons and Reply brief as well as the Tribes' Response brief, I conclude that the Superintendent's decision implementing the 1989 Operating Procedures is a reasonable exercise of [BIA's] responsibility to manage the irrigation project consistent with the protection of the Tribes' treaty fishing rights. Therefore, I reject your request that the plan be invalidated or amended and dismiss the appeal. [Footnote omitted.]

(Area Director's Decision at 9).

Appellant's appeal from this decision was received by the Board on December 29, 1989. Appellant, the Area Director, and the Tribes filed briefs.

Discussion and Conclusions

Appellant states that the issues in this appeal are:

(1) Whether the Area Director, acting for [BIA] in its trust responsibility to the Tribes, in upholding interim instream flows set at the maximum level should be reversed because he failed in his corresponding duty as officer-in-charge of the project. [2/]

(2) Whether the Area Director's decision upholding the interim instream flow levels established by the Superintendent is an error because these levels are clearly higher than the maximum indicated by the data and methodology used.

(3) Whether the Area Director abused his discretion in failing to address and remedy the issue raised by [appellant] concerning the use of Operation and Maintenance * * * funds to pay for expenditures required by the federal government's trust responsibility?

(Appellant's Opening Brief at 2).

2/ 25 CFR 171.1(a) provides:

"The Agency Superintendent, Project Engineer or such official as authorized by the Area Director is the Officer-in-Charge of those Indian Irrigation Projects or units operated or subject to administration by the Bureau of Indian Affairs, * * *. The Officer-in-Charge is fully authorized to administer, carry out, and enforce these regulations either directly or through employees designated by him."

[1] With regard to the first issue, appellant argues that BIA's dual role as trustee for the Tribes' treaty fishing rights and as officer-in-charge of the irrigation project requires it to balance the interests of the fishery and the irrigators. Appellant contends that, in establishing instream flows for the tribal fishery, BIA "must also fulfill its duty to irrigators to provide water for irrigation" (Appellant's Opening Brief at 8), and that "[f]ailure to balance the responsibilities of [BIA] to the irrigators, as well as the Tribes, constitutes failure to fulfill [BIA's] duties as officer-in-charge" (Appellant's Opening Brief at 11-12).

The Area Director and the Tribes contend that this argument was addressed and rejected by the Ninth Circuit Court of Appeals in JBC I. The Board agrees.

The district court's decision, which was reversed by the court of appeals, characterized BIA's role as a "dual" one, as does appellant here, and held that the principle of "just and equal distribution" in 25 U.S.C. § 381 (1988) 3/ was applicable to all waters of the reservation. See 646 F. Supp. at 422-26.

In rejecting the district court's interpretation of the "just and equal" language of 25 U.S.C. § 381, the court of appeals stated:

[T]hose provisions impose duties upon the BIA in managing the project's irrigation water in fairness to all irrigators; they do not deal at all with the BIA's duty in helping the Tribes to protect their prior and paramount fishing water rights. While the Joint Board and junior appropriators are free to contest by legal means the Tribes' and BIA's quantification of the Tribes' fishing water rights, the Joint Board has produced, and we find, no authority that guarantees it a right to participate in the process by which the BIA and Tribes initially establish that quantification. [Emphasis in original.]

(832 F.2d at 1132).

Further, as the Area Director argues, the court of appeals "also rejected the notion that BIA has a 'dual' or equal responsibility to both the Tribes and the irrigators" (Area Director's Brief at 11). The court stated:

3/ 25 U.S.C. § 381 (1988) provides:

"In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

All further references to the United States Code are to the 1988 edition.

The action of the BIA in establishing stream flow and pool levels necessary to protect tribal fisheries is not unreviewable. In making its determination, however, the BIA is acting as trustee for the Tribes. Because any aboriginal fishing rights secured by treaty are prior to all irrigation rights, neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority. [Emphasis in original.]

(832 F.2d at 1132).

There can be no doubt that the Ninth Circuit Court of Appeals has decided the issue appellant attempts to pursue here. The Board is bound by that decision. 4/

[2] Appellant's second argument concerns the levels at which BIA established instream flows. BIA established the instream flow levels at the "high inflection points" of the reservation streams. This choice is explained in the Area Director's brief:

[A]pplication of the wetted perimeter methodology [5/] provides a range of flows related to habitat maintenance. * * * The procedure results in the determination of low and high inflection points corresponding to low and high flows. Flows at or near the high inflection point represent stream flow requirements necessary to maintain healthy and productive fisheries. Flows at or near the

4/ The court of appeals recognized appellant's right to challenge BIA's establishment of instream flow levels "by legal means," including the administrative appeal process. JBC I, 832 F.2d at 1132; JBC II, 862 F.2d at 200-201. Clearly the court did not intend, as appellant appears to suggest it did, that appellant is entitled to relitigate the underlying premise of its decision in JBC I.

5/ This methodology is described in a 1984 paper entitled "Guidelines for Using the Wetted Perimeter (WEPT) Computer Program for the Montana Department of Fish, Wildlife and Parks" by Frederick A. Nelson.

In its appeal to the Area Director, appellant argued that this methodology was not appropriate and advocated use of another methodology entitled "instream flow incremental methodology (IFIM)." In his Nov. 22, 1989, decision, the Area Director stated that while "IFIM is an acceptable tool for determining instream flows, we also continue to believe that the wetted perimeter method is an equally valid and acceptable tool." He noted that IFIM data for reservation streams was incomplete and held that "[i]n the absence of more definitive information, use of wetted perimeter methodology provides an adequate and reasonable means for meeting [BIA's] productive fishery management objectives" (Area Director's Decision at 5-6).

Appellant did not pursue this issue on appeal to the Board.

low inflection point provide a low level of habitat maintenance with corresponding implications for the fish population. * * * [T]he high inflection point is chosen because it reflects aquatic habitat maintenance which will more consistently produce healthy and thriving fish populations. * * * Thus, the 1989 Operating Procedures establish flows at the high inflection point in order to protect a healthy, productive fishery for the Tribes.

(Area Director's Brief at 15-16).

Appellant argues: "Assuming that it is proper for the interim instream flow levels to be set at the maximum inflection point, the Agency Superintendent in fact set the flow levels above that point, and the Area Director's decision upholding the Superintendent should be reversed because of this error" (Appellant's Opening Brief at 20; emphasis in original). Appellant cites only one example of the alleged error, i.e., the North Fork of the Jocko River below the Tabor Feeder Canal, for which appellant contends the instream flow level was set at 18 cubic feet per second (cfs) although the high inflection point was only 7 cfs.

In response to this allegation, the Area Director submits an affidavit from a BIA Environmental Protection Specialist, who states, inter alia, that appellant's allegation of error in its cited example is based on incomplete data. The BIA affidavit, which is accompanied by supporting graphs and cross-sections, states that the complete data show that 7 cfs is the low inflection point and 18 cfs is the high inflection point. Appellant made no response to the Area Director's argument on the merits, although it had the opportunity to do so in its reply brief. 6/

It is well established that, in appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision is erroneous or not supported by substantial evidence. E.g., Kays v. Acting Muskogee Area Director, 18 IBIA 431, 438 (1990). While appellant makes a general allegation of error concerning BIA's establishment of instream flow levels, it has cited only one example of such alleged error and has failed to support even that example in the face of the Area Director's refutation. The Board concludes that appellant has not carried its burden of showing error in BIA's establishment of the instream flow levels.

6/ Appellant did, however, move to strike the affidavit of the BIA Environmental Protection Specialist on the grounds that it was information which should have been included in the administrative record. The affidavit was clearly prepared in response to an argument raised by appellant for the first time in its opening brief before the Board. The Area Director was entitled to respond to the argument.

Appellant also moved, for different but equally non-meritorious reasons, to strike the other exhibits submitted with the Area Director's brief. Appellant's motion is denied.

Lastly, appellant contends that the Area Director abused his discretion by failing to address an issue appealed to him concerning the propriety of using operation and maintenance funds for fish rescue.

The Area Director did not address this issue in his November 22, 1989, decision. Appellant must bear at least part of the blame for this omission, however, because of its failure to clearly identify the matter as an issue on appeal in its filings before the Area Director. The Board rejects appellant's argument that the Area Director "abused his discretion" but, for the reasons discussed below, finds that this issue should be remanded to the Area Director for issuance of a decision on the matter.

The Area Director argues, inter alia, that this matter is not properly before the Board because

[c]lost allocation at the project, and whether specific expenditures are appropriate or legitimate, is a function of the project's budget and the assessment of the annual operation and maintenance rate. * * * The [BIA's] process for setting rates is rule-making under the Administrative Procedure Act, and this Board does not have jurisdiction to review that process. See Joint Board of Control v. [Portland] Area Director, 17 IBIA 65 (1989).

(Area Director's Brief at 18).

Operation and maintenance rates for 1989 and subsequent years were proposed by notice published in the Federal Register on October 5, 1988, 53 FR 39153, and made final by notice published on January 6, 1989, 54 FR 491. Appellant was given an opportunity to review the budget for the project and made extensive comments on the proposed rate. Appellant's comments were taken into consideration in the promulgation of the final rate. See 54 FR 491-92. 7/

7/ While the establishment of operation and maintenance rates has been recognized as rulemaking, the adoption of operating procedures has followed a hybrid route, encompassing characteristics of both rulemaking and adjudicatory procedures. No party has raised the question of whether the 1989 Operating Procedures are a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4). The Federal courts which have issued decisions in this matter have treated the adoption of operating procedures as adjudicatory rather than rulemaking actions. See JBC II, 862 F.2d at 199-200. The Board finds that the Ninth Circuit's analysis in JBC II is binding in this case.

In any event, appellant clearly had actual and timely notice of the action. See 5 U.S.C. § 552(a): "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to published in the Federal Register and not so published."

The allocation of operation and maintenance funds to fish rescue operations would appear to be, as the Area Director argues, properly a determination to be made as a part of the budget and rate-setting procedure. If such an allocation was revealed in the materials available to appellant during the review process for the 1989 operation and maintenance rate, appellant should have raised the issue during that proceeding and accordingly should be precluded from raising it in this appeal. However, if appellant's first notice of this allocation was in the 1989 Operating Procedures, appellant is entitled to raise the issue in this appeal.

Because the record for the rate-setting proceeding is not before the Board, it is not possible to determine whether the allocation for fish rescue was disclosed in the documents available to appellant during that proceeding. For this reason, and because the Area Director has not yet ruled on the fund allocation issue in this appeal, the Board finds that this case must be remanded in part, for the limited purpose of allowing the Area Director to determine whether the matter was included in the 1989 rate-setting procedure and, if he determines it was not, issuing a decision on the merits.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Area Director's November 22, 1989, decision is affirmed in part, and this matter is remanded to him for further proceedings in accordance with this opinion.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge